

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 2000 Session

STATE OF TENNESSEE v. BILLY JOE DILL

Direct Appeal from the Criminal Court for Hamilton County
No. 224478 Douglas A. Meyer, Trial Judge

No. E1999-01779-CCA-R3-CD - Decided
October 2, 2000

The defendant pled guilty to one count of statutory rape and received judicial diversion pursuant to Tenn. Code Ann. § 40-35-313. However, after receiving diversion and after his diversionary period had expired, the defendant failed to comply with the Sex Offender Registration and Monitoring Act. For this failure, he was indicted and ultimately pled guilty to one count of violation of the Sexual Offender Registration and Monitoring Act (Tenn. Code Ann. § 40-39-108) but reserved one issue for appeal: Does the Sex Offender Registration and Monitoring Act lawfully require a registrant to remain on the registry after the original case was disposed of pursuant to judicial diversion? Answering this question, we decide that this defendant does not fairly fall within the ambit of Tenn. Code Ann. § 40-39-102(2)(A) and therefore is not required to comply with the Sex Offender Registration and Monitoring Act. Accordingly, we reverse the judgment from the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court
Reversed and Dismissed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which THOMAS T. WOODALL, and ALAN E. GLENN, JJ., joined.

Ardena J. Garth, District Public Defender, and Donna Robinson Miller, Assistant District Public Defender, Chattanooga, Tennessee, for the appellant, Billy Joe Dill.

Paul G. Summers, Attorney General & Reporter; Patricia C. Kussmann, Assistant Attorney General; William H. Cox, III, District Attorney General; and Dean Ferraro, Assistant District Attorney, for the appellee, State of Tennessee.

OPINION

Introduction

The defendant, Billy Joe Dill, appeals a certified question from his guilty plea to one count of failing to register in compliance with the Sex Offender Registration and Monitoring

Act. He was sentenced to the statutory minimum of one hundred-eighty days in the workhouse. After careful review of this conviction and sentence, we conclude that the Sex Offender Registration and Monitoring Act cannot properly apply to this defendant and therefore reverse and dismiss the trial court's judgment.

Facts

On October 11, 1995, the defendant pled guilty to one count of statutory rape. The trial court, considering the facts of the case, placed the defendant on judicial diversion pursuant to Tenn. Code Ann. § 40-35-313. Following this placement, the defendant registered with the Tennessee Bureau of Investigation as a "sex offender." However, in September 1996, the defendant, contrary to statute, failed to complete and return his "verification forms," as required by statute, and was therefore indicted. After indictment, he resumed returning the verification forms and pled guilty to this one count of failing to return a verification form. However, as one condition of his guilty plea, the defendant reserved appeal on a certified question of law. That certified question of law is now before this Court.¹

Analysis

This appeal presents one specific question: Does the Sex Offender Registration and Monitoring Act violate the state and federal constitutions by requiring a registrant to remain on the registry after his original case was dismissed pursuant to a judicial diversion and his diversionary period has expired?

Tenn. Code Ann. § 40-39-103, the statute which requires the registration of "sexual offenders," reads:

Sexual offender registration – Monitoring forms – Contents. --

- (a) Within ten (10) days following release on probation, parole, or any other alternative to incarceration; within ten (10) days following discharge from incarceration without supervision; within ten (10) days following any change of residence; and within ten (10) days after coming into a municipality or county in which the sexual offender temporarily resides or is domiciled for such length of time; each sexual offender shall complete a TBI sexual offender registration/monitoring form and shall cause such form to be delivered to TBI headquarters in Nashville. A person who is placed on probation or parole in another state for an offense that would be a sexual offense in this state and who is residing in this state pursuant to the compact for out-of-state supervision codified in chapter 28, part 4 of this title, shall be subject to the same registration and monitoring requirements of this chapter as a person placed on probation or parole for a sexual offense in this state.

¹ See Tenn. Rules of Crim. Pro. 37(b)(1)(iv).

Sexual offender registration/monitoring forms shall require disclosure of the following information:

- (1) Complete name as well as any alias or aliases;
 - (2) Date and place of birth;
 - (3) Social security number or numbers;
 - (4) State of issuance and identification number of any valid driver license or licenses;
 - (5) For a sexual offender on supervised release, the name, address, and telephone number of the registrant's probation and parole officer, or other person responsible for the registrant's supervision;
 - (6) Sexual offense or offenses of which the registrant has been convicted;
 - (7) Current place and length of employment;
 - (8) Current address and length of residence at such address;
 - (9) Race and gender; and
 - (10) Such other registration and/or monitoring information, including a current photograph, as may be required by rules promulgated by the TBI in accordance with the provisions of the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.
- (b) In accordance with the provisions of this chapter, the TBI may require a registrant, or the registrant's supervising authority, to submit a current photograph of the registrant.

Further, Tenn. Code Ann. § 40-39-108, the offense for which the defendant was charged reads:

Violations – Penalties.

- (a) Knowing falsification of a sexual offender registration/monitoring form or verification/monitoring form constitutes a Class A misdemeanor for the first offense, punishable by confinement in the county jail for not less than one hundred eighty (180) days.

Reading these two statutes in concert, “sexual offenders” are required to register with the TBI and face criminal prosecution for a Class A misdemeanor if they fail to comply. However, and this brings us to the issue at hand, one must first qualify as a “sexual offender,” which is defined by Tenn. Code Ann. § 40-39-102(2) as:

A person who is, or has been, convicted in this state of committing a sexual offense or who is, or has been, convicted in another state or another country, or who is or has been convicted in a federal or military court, of committing an act which would have constituted a sexual offense if it had been committed in this state; provided, that:

- (a) Conviction, pretrial diversion, judicial diversion, or any other alternative to incarceration occurs on or after January 1, 1995; or
- (b) If conviction occurred prior to January 1, 1995, the person:
 - (i) Remains under or is placed on pretrial diversion, judicial diversion, probation, parole, or any other alternative to incarceration on or after January 1, 1995;

- (ii) Is discharged from pretrial diversion, judicial diversion, probation, parole, or any other alternative to incarceration on or after January 1, 1995; or
- (iii) Is discharged from incarceration without supervision on or after January 1, 1995.

It is this definition which is the crux of the problem here. For while § 40-39-102(2), the statute above, mentions judicial diversion three times, see subsection (a), (b)(i), and (b)(ii), it begins with the phrase “a person who is, or has been, convicted of.” Clearly, reading the first paragraph of the statute, conviction is plainly a prerequisite to sexual offender status. This makes sense; conviction as a line of demarcation between sexual offenders and non-sexual offenders is both workable and sensible.

However, the contradiction arises when one continues to read subsections (a) and (b) which mentions both “pretrial and judicial diversion” three separate times. This is confusing because those defendants whose cases are disposed of through judicial diversion are not convicted. Rather, proceedings against a qualified defendant are deferred and no judgment of guilt is entered. See generally Tenn. Code Ann. 40-35-313. Therefore, under the first and dominant paragraph of the statute, they are not “sexual offenders.” Yet, subsections (a) and (b) seem to contemplate their inclusion. This is confusing, vague, and ambiguous.

In the face of this confusion, we are instructed by several principles important to the constitutional law including legality, notice, fairness, and due process. Generally, the language of a penal statute must be clear and concise to give adequate warning so that individuals might avoid the forbidden conduct. See State v. Boyd, 925 S.W.2d 237, 242-43 (Tenn. Crim. App. 1995). A basic principle of due process is that an enactment whose prohibitions are not sufficiently defined is void for vagueness. See State v. Lakatos, 900 S.W.2d 699, 701 (Tenn. Crim. App. 1994). In this case, these values and protections must apply, and we are bound to conclude that this defendant’s violation of the Sex Offender Monitoring Act should be reversed and dismissed. Simply put, he has not been “convicted” of a sex offense, and we cannot conclude that the statute’s language puts him on fair notice.

We note that during our disposition of this appeal certain legislation, Public Act 2000, Ch. No.862, House Bill No.2783, amended Tenn. Code Ann. 40-39-102(a) by removing persons whose cases have been disposed of through judicial diversion from the list of “sexual offenders” required to register. While this legislation did not take effect until May 31, we consider it strong authority, and a signal that our disposition is correct.

Conclusion

Accordingly, we reverse and dismiss the judgment from the trial court.

JOHN EVERETT WILLIAMS, JUDGE